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Board of Pardons v. Allen, a postscript



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BOARD OF PARDONS V. ALLEN: A POSTSCRIPT

A Report Prepared for the Criminal Justice and Corrections Advisory Council STATE DOCUMENTS COLLECTION

By Lois Menzies, Project Director

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At the Criminal Justice and Corrections Advisory Council meeting in February, Assistant Attorney General Clay Smith discussed a recent U.S. Supreme Court decision regarding parole in Montana, Board of Pardons v. Allen, 107 S. Ct. 2415 (1987). The Allen case was initiated by two Montana State Prison inmates who charged that the Board of Pardons denied them due process by not applying the statutory criteria for granting parole and by not fully explaining its reasons for parole denial. The U.S. Supreme Court, in a 6-3 decision, ruled that Montana's parole-eligibility statute (46-23-201, MCA) creates an expectation of release because it requires (by the use of the mandatory language "shall") that the Board parole an inmate when the Board determines that the statutory criteria for release are present.¹ According to the Court, this expectation of parole release is a liberty interest entitled to constitutional

¹ Section 46-23-201, MCA, provides:

"(1) . . . [T]he board shall release on parole by appropriate order any person confined in the Montana state prison or the women's correction center, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2), when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community

(2) . . . A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfil the obligations of a law-abiding citizen"

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due process protections.

Mr. Smith indicated to the Council that the Allen case probably would have little or no immediate impact on the Board's procedures. He noted that the Board has revised its disposition forms to more adequately explain its reasons for denying parole. These new forms presumably satisfy any due process requirements.

While the immediate impact of Allen may be negligible, the future effect of the decision is unknown. In a letter to Council staff prepared after the February meeting, Mr. Smith noted that case law concerning due process protections is constantly evolving; there is no guarantee that today's parole board procedures will meet due process requirements in future years.² If future courts, in an effort to further insure the fairness and integrity of the parole system, expand due process protections, the Board may be required to amend its procedures accordingly. Expanded due process requirements may place additional administrative and/or financial burdens on the Board.

Possible future effects of the Allen decision could be negated through legislative action by replacing the mandatory language in 46-30-201, MCA, ("shall") with discretionary language ("may"). This would remove the liberty interest found in Allen and thus the requirement for due process protection. However, it is likely that such an amendment could only be applied prospectively to offenders sentenced after the amendment's effective date.

² Letter to Lois Menzies from Clay Smith, March 1, 1988.